

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

EDDIE OFFIONG ETTE,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE

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NO. PD-0538-17

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COURT OF CRIMINAL APPEALS
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STATE'S BRIEF ON THE MERITS OF
APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
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Trial Court Judge:

Hon. David Hagerman, Judge, 396th Judicial District Court of Tarrant County,
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Parties to the Judgment:

Appellant, Eddie Offiong Ette, and the State of Texas

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This brief is filed on behalf of the State of Texas by Sharen Wilson, Criminal District Attorney of Tarrant County. The appellant is challenging the Second Court of Appeals' decision to uphold the \$10,000 fine assessed by the jury and stated in the signed written judgment despite its omission from the trial court judge's oral pronouncement of sentence.

STATEMENT OF THE CASE

The appellant was convicted of misapplication of fiduciary property. (C.R. I:124; R.R. VII:7-8). The jury sentenced him to ten years' community supervision and assessed a \$10,000 fine. (C.R. I:133, 135; R.R. VII:68-69).

On May 18, 2017, the Court of Appeals rejected the appellant's claims that the trial court violated his right to confrontation and right to present a defense by limiting his cross-examination, and that his \$10,000 fine should be deleted from the written judgment because the trial court did not mention the fine in its oral pronouncement of sentence. [*Ette v. State*, __ S.W.3d __, 2017 WL 2178875, at *5, 6 \(Tex. App. – Fort Worth 2017, pet. granted\)](#).¹

On September 13, 2017, this Court granted the appellant's petition for discretionary review to determine whether the Court of Appeals erred in affirming a fine included in the judgment which had been orally pronounced by the trial court at sentencing.

ISSUE PRESENTED

Did the Court of Appeals err in affirming a fine included in the written judgment which had not been orally pronounced by the trial court judge at sentencing?

1 Justice Kerr dissented that the omission of the appellant's \$10,000 fine from the sentence's oral pronouncement did not create an ambiguity and, as such, the fine should be deleted from the written judgment. See [*Ette v. State*, 2017 WL 2178875 at *12 \(Kerr, J., dissenting\)](#).

STATEMENT OF FACTS

The trial court's reception of the jury's punishment verdict and its sentencing of the appellant occurred as follows:

THE COURT: Mr. Foreperson, we received a note. "The jury has everyone reached a verdict." Have you reached a verdict on punishment?

FOREMAN: Yes, we have.

THE COURT: Is it a unanimous verdict?

FOREMAN: Yes, it is.

THE COURT: Hand the verdict to the bailiff, please.

Verdict Form: We, the jury, having found the defendant, Eddie Offiong Ette, guilty of the offense of misapplication of fiduciary property as charged in the indictment, assess his punishment at confinement in the Correctional Institutions Division of the Texas Department of Criminal Justice for 10 years and we do recommend that the imposition of his sentence be suspended and that he be placed on community supervision. In addition thereto, we, the jury, assess a fine of \$10,000 and we do not recommend that such fine be suspended. Signed by the foreman of this jury.

Does either side wish the jury to be polled?

MR. WALLACE: No, Your Honor.

MR. WESTFALL: No, Your Honor.

THE COURT: Defendant, please rise.

In Cause No. 1363508D; State of Texas versus Eddie Offiong Ette. The jury, having found you guilty upon your plea of not guilty to the offense

of misapplication of fiduciary property, and having assessed your punishment at 10 years' confinement in the penitentiary, and having recommended that your sentence be suspended, your sentence is hereby suspended and you will be placed on community supervision for a period of 10 years.

Terms and conditions of your supervision are set out in the Court's documents, which I will give you in a few minutes, and you are ordered by the Court to follow each and every one of those conditions. If you violate any one of the terms and conditions, your probation may be revoked and you have to serve a term of incarceration.

In addition to that, the Court will impose restitution in the amount of \$350,000 as a condition of your probation.

Do you understand your sentence, Mr. Ette?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I'm sorry?

THE DEFENDANT: Yes, Your Honor.

(R.R. VII:67-69).

SUMMARY OF THE ARGUMENT

The Court of Appeals properly resolved the discrepancy between the trial court's oral pronouncement and written judgment by upholding the jury verdict assessing a \$10,000 fine.

ARGUMENT

This case provides the Court with an opportunity to resolve what should happen in jury-determined punishment cases when the trial court's oral pronouncement of sentence conflicts with its written judgment, but the written judgment accurately reflects the punishment rendered by the jury.

The Code of Criminal Procedure directs that a "defendant be punished in accordance with the jury's verdict". **Tex. Code Crim. Proc. art. 42.01 §1(8)**.² Accordingly, this Court has held that trial courts generally have no power to change a lawful jury verdict unless it is with the jury's consent and before they have dispersed. *Ex parte McIver*, 586 S.W.2d 851, 854 (Tex. Crim. App. 1979). Once a lawful sentence is assessed, the trial court has very little authority to do anything other than to impose the jury's sentence. *State v. Dudley*, 223 S.W.3d 717, 721 (Tex. App. - Tyler 2007, no pet.). The trial court's written judgment herein comported with the jury's written verdict. (C.R. I:133, 135).

The Code of Criminal Procedure also requires that sentence be pronounced in the defendant's presence. **Tex. Code Crim. Proc. art. 42.03**

² A "verdict" is the "written declaration by a jury of its decision of the issue submitted to it". **Tex. Code Crim. Proc. art. 37.01**.

§1. This Court has interpreted this oral pronouncement requirement to include any fines. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004). The judgment, including the sentence assessed, is just the written declaration and embodiment of that oral pronouncement. *Taylor v. State*, 131 S.W.3d at 500. Generally, when there is a conflict between the oral pronouncement of sentence and the sentence in the written judgment, the oral pronouncement controls. *Taylor v. State*, 131 S.W.3d at 500. The *Taylor* case, however, did not involve a jury verdict. See *Taylor v. State*, 131 S.W.3d at 498-99.

When it comes to reviewing the assessed punishment, there is a true distinction between non-jury proceedings such as a plea hearing or a bench trial and jury trials where it assessed punishment. *Milczanowski v. State*, 645 S.W.2d 445, 446-47 (Tex. Crim. App. 1983) (in a bench trial, the reviewing court is limited to the trial court judge's statements while in jury trial the reviewing court has the written verdict form to ascertain the fact-finder's actual punishment determination). Given this distinction, a hard-and-fast rule that the oral pronouncement controls may work fine in evaluating a non-jury proceeding where the oral pronouncement is the only indicator of the assessed punishment; however, it does not work so easily in a jury trial where there are

other indicators such as the jury's written verdict form and where statutorily the punishment must reflect that verdict. Thus, such a rule as the "oral pronouncement controls" rule should not be absolute

Courts have already recognized one exception when the trial court's oral pronouncement of sentence is ambiguous as opposed to explicitly conflicting with the written judgment. [*Aguilar v. State*, 202 S.W.3d 840, 843 \(Tex. App. - Waco 2006, pet. refused\)](#). In those situations, the jury's punishment verdict, the trial court's pronouncement, and the written judgment are read together in an effort to resolve the ambiguity. [*Aguilar v. State*, 202 S.W.3d at 843](#). This ambiguity exception allows harmonization between the court-created general construct elevating oral pronouncements and the otherwise conflicting protective ladder of common law, statutes, and constitutional provisions placing valid jury verdicts on punishment beyond a trial judge's reach. [*Kimble v. State*, 2016 WL 2840922, at *1 \(Tex. App. - Fort Worth May 12, 2016, pet. refused\)](#) (not designated for publication).

In finding that the trial court's oral pronouncement of sentence was ambiguous, the Court of Appeals observed that:

- The trial court judge omitted any mention of the lawful fine assessed by the jury from his repeated report of their verdict, despite having just read the entire verdict (including the fine) aloud and accepted it;

- The trial court judge did not pronounce a different fine or pronounce a “zero” fine or simply refuse to pronounce a fine, which did not reveal any clear intent regarding why he omitted the fine; and
- Every document associated with this case – the written jury verdict, the written judgment, the bill of cost and the conditions of community supervision³ – also reflects the jury’s assessment of a \$10,000 fine.

Ette v. State, 2017 WL 2178875, at *5-6. Given these circumstances, the Court of Appeals reasonably concluded that this pronouncement was ambiguous. *Ette v. State*, 2017 WL 2178875, at *6.⁴

If the oral pronouncement was not ambiguous, this Court should consider a second needed exception – what should happen when the trial court’s oral pronouncement of sentence inadvertently omits the lawful fine assessed by the jury? A conclusion that the fine’s omission was inadvertent or a mere oversight rather than intentional is supported by the fact that the trial court did not mention any fine whether it be the jury-assessed fine, a greater fine, a lesser fine or no fine at all. *Ette v. State*, 2017 WL 2178875, at *6.⁵

3 (C.R. I:133, 135, 138, 140).

4 The Court of Appeals’ ambiguity determination was not unprecedented. See *Kimble v. State*, 2016 WL 2840922, at *2 (written judgment properly included \$4,000 fine despite its omission from the trial court’s oral pronouncement of sentence where the jury’s unanimous punishment verdict assessing the fine was read aloud in open court, and that verdict matched the jury’s written verdict filed with the clerk’s record).

5 Justice Kerr even acknowledges that the trial court’s omission of a fine may have been a mistake due to forgetfulness or a misunderstanding over whether

This Court should uphold the remedy pursued by the Court of Appeals: Harmonize the record before it – the jury verdict, the trial court’s pronouncement, and the written judgment – in order to protect the valid jury verdict. See [Ette v. State](#), 2017 WL 2178875, at *5. Carving out this exception avoids a conflict with the statutory limitation on changing a jury’s verdict without their consent. See [Ex parte McIver](#), 586 S.W.2d at 854. To do otherwise and make the trial court’s omission of the fine in its oral pronouncement paramount over the jury’s actual verdict assessing the fine would vitiate the statutory requirement that a defendant be punished in accordance with the jury’s sentencing verdict. See [Tex. Code Crim. Proc. art. 42.01 §1\(8\)](#).

Finding this situation to be ambiguous or creating a new limitation or exception for inadvertence would not deprive the appellant of his due process and notice rights. See [Ex parte Madding](#), 70 S.W.3d 131, 136 (Tex. Crim. App. 2002) (a defendant has a due process “legitimate expectation” that the sentence he heard orally pronounced in the courtroom is the same sentence that he will

the fine must be pronounced at sentencing while concluding that this sort of mistake does not constitute an ambiguity. See [Ette v. State](#), 2017 WL 2178875, at *7.

be required to serve). The “oral pronouncement controls” rule is based on the rationale that the imposition of sentence is the crucial moment when all of the parties are physically present at the sentencing hearing and able to hear and respond to the imposition of sentence. *Ex parte Madding*, 70 S.W.3d at 135. Unlike in *Madding* where the “unfavorable” stacking order first appeared when the judgment was signed fifty-two days after sentencing⁶, the appellant was physically present in the courtroom when the trial court judge read the jury verdict, including the assessed \$10,000 fine, and asked his counsels for any response before he orally pronounced sentence. (R.R. VII:67-69). Thus, upholding the \$10,000 fine would not violate the appellant’s due process or notice rights.

Texas has long ascribed a certain sanctity to jury verdicts which should not be lightly annulled or disregarded. *Watson v. State*, 204 S.W.3d 404, 430 (Tex. Crim. App. 2006) (Cochran, J., dissent), *called into doubt by Brooks v. State*, 323 S.W.3d 893, 898-902 (Tex. Crim. App. 2010); *Miller v. Schmullen*, 37 Tex. 233, 240 (1872). As this Court’s predecessor wrote 150 years ago:

When a jury has deliberated, and made up and returned their unanimous verdict--a verdict neither in conflict with the law or the evidence - it is due alike to public and private interests, and to the sanctity of, and a

6 See *Ex parte Madding*, 70 S.W.3d at 133.

becoming respect for, the jury trial, that courts should not upon trivial grounds interfere or meddle with that verdict.

Leverett v. State, 3 Tex. Ct. App. 213, 216 (1877). What could be a more trivial ground for rescinding the jury's lawful assessment of a fine than the trial court judge's failure to repeat that fine he had just accepted when reading the jury's verdict in the appellant's presence. (R.R. VII:68-69). Thus, the Court of Appeals properly respected the jury's punishment verdict in resolving the discrepancy between the oral pronouncement of sentence and the written judgment.

CONCLUSION

Conflicts between the oral pronouncement of sentence and the written judgment in cases where the jury assessed punishment should be resolved in favor of the jury's actual verdict. This Court should limit the "oral pronouncement controls" rule to non-jury trials or proceedings or should carve out an exception to that rule for inadvertent omissions. Creating a distinction between jury trials and non-jury trials or proceedings would not violate a defendant's due process or notice rights if he is present when the jury punishment verdict is read in open court and accepted by the trial court.

PRAYER

The State prays that this Court, affirm the Court of Appeals' decision to uphold the \$10,000 fine assessed by the jury and stated in the signed written judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the State's brief on the merits of the appellant's petition for discretionary review have been electronically served on opposing counsel, Mr.

Daniel Collins (daniel@danielcollinslaw.com), 3663 Airport Freeway, Fort Worth, Texas 76111; and on the State Prosecuting Attorney, Stacey M. Soule (information@spa.texas.gov), P.O. Box 13046, Austin, Texas 78711-3046, on this, the 17th day of October, 2017.

/s/ Steven W. Conder

STEVEN W. CONDER

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains approximately 1979 words, excluding those parts specifically exempted, as computed by Microsoft Office Word 2013 - the computer program used to prepare the document.

/s/ Steven W. Conder

STEVEN W. CONDER

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